



## NAVAJO DIVISION OF TRANSPORTATION

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*Via Electronic Mail Document Submission*

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Tribal Consultations and Informational Meeting Comments  
U.S. Department of the Interior  
BIA Office of Indian Services, Mail Stop 4513 MIB  
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***Re: Comments on the Draft Revisions to the Indian Reservation Roads  
Program Regulations, 25 C.F.R. Part 170***

Dear Mssrs. Gishi and Sparrow:

The Navajo Division of Transportation offers the following comments in response to the Bureau of Indian Affairs (BIA) Federal Register Notice of April 12, 2013 (78 Fed. Reg. 21861), regarding Tribal Consultation on the Draft Regulations Governing the Tribal Transportation Program. This summary identifies specific sections of the draft regulations that require additional development and clarification.

1. Explain fiscal rule 23 U.S.C. §201(b) and the impact on old money and projects.
  - a. Explain how the provisions of Section 201(B) will impact funds distributed prior to MAP-21. How will this impact tribes that have to build up funds over several years to generate enough to construct a project?
  - b. How can the funds that are not unexpended after 3 years be returned to the tribe?

- c. How do tribal shares that are prior year funds under Bureau of Indian Affairs (BIA) management transferred to a tribe that initiates a Federal Highway Administration (FHWA) contract?
2. Tribes have had inadequate time to comment on the regulations. The BIA and FHWA have not allowed sufficient time for tribal consultation on these complicated proposed regulations. There should be more tribal consultation on a local level. Many tribes do not have the resources, including budget analysts, policy specialists, attorneys, and other technical expertise to properly assess this regulation. The BIA and FHWA should provide more detailed information and data to tribes that explain the impact of the proposed rule.
3. What rules apply to BIA and Division of Transportation's (DOT) administration of the Tribal Transportation Program (TTP)? The proposed regulation does not provide clear and consistent guidance to BIA and DOT program operations. Tribes have concerns about inconsistent application of TTP rules in different BIA regions and this can be corrected by having regulations that apply across the agency. Examples of areas that require federal agency regulation are right-of-way acquisition and management, appraisal, environmental review and tribal share allocation. Current right-of-way acquisition lacks a defined process for BIA processing right-of-way documents. The federal decision making process should be streamlined and consistent with levels of responsibility identified in the regulation. There is a need for a consistent regulation to cover acceptance of a completed road construction project into the BIA system.
4. The regulations do not identify who is responsible for administering these rules. The regulations should clearly identify the statutory authority it is exercising and the federal agency responsible for implementing and enforcing that regulation or activity. Currently the regulation mixes the various MAP-21 requirements into the regulations without identifying how the agency is to implement or oversee the activity.
5. What is impact on approved Long-Range Transportation Plans (LRTP)? How are tribes with existing LRTPs impacted in terms of funding, inventory, references to old funding categories? Will LRTPs developed under SAFETEA-LU authority still be considered valid, and if not, when will they have to be revised?
6. Clarify 23 U.S.C. §201(c)(3) & (4) TTIP development and inclusion with state. Tribes need further guidance on the meaning of regional significance and determining which projects should be subject to state and MPO participation. Will this apply to rural planning organizations?

7. Clarify 23 U.S.C. §201(c)(5) asset management. MAP-21 requires the Secretary of Interior and Transportation to implement safety, bridge, pavement, and congestion management systems for facilities funded under the tribal transportation program in support of asset management. The proposed regulation does not follow this legislative requirement.
8. Clarify 23 U.S.C. §201(c)(6) authorities and activities and the connection to P.L. 93-638 contracting. 23 U.S.C. § 201(c)(6) requires the Secretaries to collect and report data necessary to implement the tribal transportation program in accordance with ISDEA, including inventory and condition information on tribal transportation facilities and bridge inspection and inventory information. This provision should be implemented in the regulations to identify the policies and procedures to be used in collecting and disseminating this data. The data should be provided to tribes on a regular basis in a format they can readily use. Regulations should include provisions for tribes to contract for this activity and identify funding for this data collection function.
9. Does Buy Indian Act and 7(b) apply to FHWA contracts? Are tribes that receive their TTP funds from FHWA subject to the requirements of 23 U.S.C. §202(a)(10)(B)?
10. Clarify 23 U.S.C. §202(b)(1) and 23 U.S.C. §201(c)(6)(b) – whose standard applies to inventory data collection? 23 U.S.C. §201(c)(6)(b) requires the Secretary of DOT to develop data collection standards which would include inventory data and 23 U.S.C. §202(b)(1) requires the Secretary of the Interior to maintain the TTP Inventory. The proposed draft regulation does not contain the standards for data collection that Interior must follow in maintaining the TTP Inventory. These standards from DOT and policies and procedures on how the TTP Inventory will be maintained by DOI must be included as part of this regulation.
11. Rules for determining majority of American Indian/Alaska Native residents. 23 U.S.C. §202(b)(B)(v) allows for the inclusion of public roads within tribal reservations, villages and communities in which the majority of residents are American Indians or Alaska Natives. The proposed rule does not provide a methodology for determining which public roads fall within this category.
12. Rule for dealing with undocumented ownership roads. Tribes have inherited a road system from the BIA, states and counties that do not have documented road right-of-way for many of the roads. The draft regulation does not address this significant issue that leaves tribes with the burden of researching easements and quieting title on many miles or roads. The draft regulation should address how the BIA will take responsibility for clarifying road ownership status and acquisition of right-of-way where such acquisition had not been performed.

13. Rule for reporting roads built with Highway Trust Funds since 1983. Tribes are responsible for updating the road inventory data. Section 202(b)(B)(iv) allows roads that were constructed or reconstructed with funds from the Highway Trust Fund under the Indian reservation roads program since 1983. The draft regulation should provide a process for BIA to follow to make this information available within a specific timeframe upon tribal request. A report that identifies the roads qualifying under this provision should be provided to tribes.
14. Rules for primary access routes. The draft regulation does not include a provision concerning the criteria for including or adding primary access routes to the National Tribal Transportation Program Facility Inventory (NTTFI). The agencies should have included the criteria for adding or retaining a primary access route in the NTTFI for tribal consideration and comment. Primary access routes should be limited to not exceed 15 miles in length. Primary access routes were defined in SAFETEA-LU and were the subject of TTPCC consideration and consensus deliberations for several years.
15. Clarify scope and limitations of 23 U.S.C. §202(b)(2). 23 U.S.C. §202(b)(2) provides that notwithstanding sections 563(a) and 565(a) of title 5, the Secretary of the Interior shall maintain any regulations governing the tribal transportation program. Within Sections 201 and 202 there are numerous provisions requiring standards and regulations to be developed by both DOT and DOI. The proposed regulation does not address the overall policies and procedures regarding program delivery between two federal agencies. In particular, the draft regulation does not implement Section 202(b)(2). In past years the two agencies operated under a Memorandum of Understanding or Stewardship Agreement that clarified the authority and responsibilities of each agency in implementing the IRR Program. The regulations should address program administration for each agency including delegations of authority and guidance or policy responsibility. The regulation should address the role of BIA regarding tribes that choose to contract with FHWA, and tribes that contract with BIA obtaining services from FHWA.
16. How do proposed bridges get funded? 23 U.S.C. §202(d)(2) creates a 2 percent set-aside for bridges. The draft regulations do not address this provision or provide a procedure for how those funds will be distributed. TTP Bridge Program regulations should either be included in the draft 25 CFR 170 regulations or be subject to a separate regulation. The 2 percent bridge set-aside should be limited to use for BIA and Tribally-owned bridges.
17. Clarify tribal PS&E approvals under direct FHWA agreements. Clarification is needed regarding 23 U.S.C. §202(b)(5) Health and Safety Assurances. The law

- recognizes tribal authority to approve plans, specifications and estimates on road and bridge projects with funds made available from the tribal transportation program through a contract or agreement under P.L. 93-638 under certain conditions. Does this allow tribes receiving funds directly from FHWA to exercise their PS&E approval authority? The regulations require a tribal resolution be submitted with each PS&E package but that requirement is not in the legislation and it should be removed.
18. Please provide clarification on the difference between 202(b)(6)(A)&(B) and 202(b)(7)(A)&(B). Both provisions refer to contracts and agreements with Indian tribes. These provisions are not reflected in the draft regulations.
19. Clarify 23 U.S.C. §202(b)(7)(D) – is this the authority for direct FHWA contracts? Under 23 U.S.C. §202(b)(7)(D), FHWA is authorized to enter into funding agreements with tribes to carry out a tribal transportation facility program or project under subparagraph (A). Subparagraph (A) refers to agreements authorized under P.L. 93-638. Are the agreements entered into between a tribe and FHWA considered P.L. 93-638 agreements, even though P.L. 93-638 does not apply to the Department of Transportation? This question is important because of the role tribes take in replacing the BIA in operating a funded BIA program or project and their protection from liability under the Federal Tort Claims Act.
20. Clarify 23 U.S.C. §202(b)(7)(J) – what authority (law) exists to authorize DOI to provide transportation services? 23 U.S.C. §202(b)(7)(J) provides for transfer of remaining funds from a terminated Tribal-FHWA contract to the BIA and for the BIA to provide continued transportation services in accordance with applicable law. Under MAP-21, there is no longer a direct BIA road program and all of the program authority is assumed to be passed on to tribes except for inherent federal functions. What legislative authority exists for BIA to engage in activities under the Tribal Transportation Program outside of their inherent federal functions?
21. Explain the administration of 202 planning and 201 planning – TTIP approvals. There are two seemingly conflicting and inconsistent transportation planning provisions for the Tribal Transportation Program in 23 U.S.C. §201 (c) and 202(c).
- a. 23 U.S.C. §201(c) requires:
- i. the Secretaries of DOT and DOI to implement transportation planning procedures for TTP facilities that are consistent with statewide and metropolitan planning organization planning processes
  - ii. Secretary of DOT approval of tribal transportation improvement programs
  - iii. Joint DOT and DOI asset management systems and

- iv. Joint DOT and DOI data collection and reporting for road and bridge inventory and bridge inspection.
- b. 23 U.S.C. §202(c) creates a 2 percent set-aside for tribal transportation planning and requires tribes to carry out a transportation planning process in accordance with section 201(c). It also states that funded projects must be selected by tribes from the transportation improvement program and subject to approval of the Secretaries of Interior and DOT.

The draft regulations do not reflect the requirement in 201(c) for approval of tribal transportation improvement programs. Rather the draft regulations create a process for development and approval of a TTPTIP that is not authorized by the legislation. There should be a clear process for development and approval of tribal TIPs, including clear review and approval criteria. It appears that Congress mandated DOT and DOI to implement transportation planning which means primary responsibility for undertaking the planning activities is on the federal agencies and not on the tribes. The draft regulation does not define how the federal agencies will conduct transportation planning in the absence of a tribal 638 contract. The draft regulations should provide more clarification on the transition between the prior IRR TIP process and the new TTPTIP.

- 22. How will 23 U.S.C. §202(d)(3)(a) 20ft opening be applied to culverts? 23 U.S.C. §202(d) authorizes a tribal bridge program. The eligibility criteria do not address multiple box and pipe culverts. What are the eligibility requirements for multiple box and pipe culverts?
- 23. How will 23 U.S.C. §202(f) be implemented and administrative responsibility for compliance? 23 U.S.C. §202(f) makes it mandatory for the Secretary of Transportation to determine that the obligation of TTP funds for a Federal Aid project is supplementary to and not in lieu of the obligation of a fair and equitable share of funds apportioned to the State under section 104 before approving that project on a tribal transportation facility. The draft regulation does not address this statutory requirement. What policies and procedures will be developed to carry out this requirement?

We appreciate your consideration of these comments and look forward to a written response from the Departments. If the Departments proceed with a Notice of Proposed Rulemaking, we request that you provide your written response prior to publishing the Notice of Proposed Rulemaking so that we can be afforded the opportunity to respond to any comments with which the Department disagrees.

Sincerely,

Paulson Chaco, Division Director  
Navajo Nation Division of Transportation